IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No. 38 of 2006
with
Civil Application No. 62 of 2006

1. Tukaram Arujna Pagare
since deceased through his
legal heirs:
1a. Tarabaia Laxman Sonawane
and others ..Appellants

vs.

Vijayanand Prabhakar Jadhav ..Respondent

Shri P.N.Joshi for appellants.

CORAM: S.C.DHARMADHIKARI J
19th September,2007

P.C.

1. I have heard this matter on 16th August, 2007 and at the request of Shri Joshi adjourned it to enable Shri Joshi to take instructions and deposit a sum of Rs.1,08,000/- along with interest within a period of two weeks from that date.

2. Shri Joshi sought further extensions on 29th and 30th so also on 31st August, 2007. Extension was granted till 19th September, 2007. Today, I am informed that the amount is not deposited and time was also sought on the ground that the parties are negotiating for over all settlement but those instructions are also not forthcoming, according to

Shri Joshi.

3. In these circumstances, I proceed to hear the second appeal and pass the final order.

4. This second appeal is directed against the judgment and decree of the lower Appellate Court dated 19th July, 2005 in Civil Appeal no.450 of 1999 reversing the judgment and decree of the Trial Court dated 27th August, 1999 in Reg.Civil Suit no.119 of 1997.

5. The respondent/plaintiff had instituted the above suit for specific performance of the agreement for sale and that suit was decreed partly by the Trial Court. The Trial Court held that the plaintiff is not entitled to specific performance, possession and relief of permanent injunction but is only entitled to recover a sum of Rs.1,08,000/- paid as earnest money along with interest at 6% op.a. from the date of filing of the suit till realisation from defendant nos. 1 and 2.

6. The defendant did not appeal from the said partial decree but the plaintiff appealed.

7. It is the case of the plaintiff that the land

bearing Gat no.34 situated in village Dindori Taluka Niphad admeasuring 1 H and 40 R was agreed to be sold by the original defendant partly in as much as the suit agreement was for 29 R.on the eastern side of the said land property of the original defendant no.2 is located but the suit agreement was executed by all the defendants to avoid any controversy by accepting the consideration of Rs.1,00,000/- and payment of earnest money of Rs.80,000/- The sum was accepted on 17th December, 1996. Remaining consideration was received on 4th February, 1997. As the land was a new tenure land permission of the Collector of the District was necessary. It was agreed that the defendant shall obtain necessary permission from the Collector and within one month of such permission being granted, sale deed would be executed.

8. It is the case of the plaintiff that separate receipt of possession was executed and possession of the land was also delivered. On 21st December, 1996 the defendant applied for permission. However, they refused to execute the sale deed and in such circumstances on 18th September, 1997 the above mentioned suit was filed. Since the plaintiff apprehended that his possession would be

disturbed he applied for temporary injunction and also by way of abundant caution sought relief of possession.

9. The case of the appellant before the Trial Court was that the suit land is not exclusively owned by the original defendant no.2 and that defendant nos.1and 2 had never executed any agreement of sale nor possession was delivered. It is contended that the family arrangement recorded division of the land of joint family of defendant nos. 1 and 2. Even that was not intended to be acted upon. However, on account of some monetary transaction the suit agreement was got executed. Hand loan receipt is executed by the plaintiff's father. As a security for the money lending transaction the agreement was executed and there was never any intention to sell the suit property.

10. After the issues were drawn and parties led oral and documentary evidence the suit was decreed partially as above.

11. Before the Appellate Court the plaintiff contended that this was a clear case of agreement for sale of immovable property and that he was ready and willing to perform his contract. The

lower Appellate Court framed necessary points for consideration. Execution of the suit agreement was held to be proved by the Trial Court and, therefore, the lower Appellate Court rightly did not go in to that aspect. However, the Trial Court's partial decree was reversed by the lower Appellate Court by relying upon the circumstances prevailing thereto and as deposed by the witnesses examined by the plaintiff. The case of the plaintiff that he owns the adjacent land was proved. Similarly mutation entry Exh.46 demonstrates execution of the agreement of sale of 29 R which was allotted to the original defendant no.2. This land came to the share of original defendant no.2 upon oral partition. All recitals in the suit agreement have been referred to. Thus, the agreement for sale being executed and oral partition being effected in pursuance thereof, according to lower Appellate Court, demonstrates intention of the parties to go ahead with the transaction.

12. Similarly a written application was made in pursuance of the suit agreement to the Collector seeking his permission for transfer of the land. Thus, the agreement for sale is admitted. The contents of the application, admission of defendant

no.1 and fact of the plaintiff paying the sum as aforesaid and receipt for possession are all aspects which have been duly gone into by the lower Appellate Court.

13. It is only with regard to the readiness and willingness on the part of the original plaintiff that Shri Joshi addressed me. In the submission of Shri Joshi, the lower Appellate Court ought to have appreciated that defendant no.2 filed a civil suit being suit No.141 of 1999 for recovery of Rs.1,08,000/- In that suit stand was taken by defendant no.2 that the transaction was nothing but a hand loan given to the plaintiff by him and the agreement for sale is, therefore, liable to be declared as null and void. In such circumstances, there is no consideration.

14. This negates the existence of the transaction and the readiness and willingness on the part of the plaintiff. However, the lower Appellate Court has reversed the finding of the Trial Court that the transaction was that of money lending. In my view, there is no substantial question of law involved which would warrant my entertaining the second appeal. In paras 22 and 23 of the lower Appellate Court’s judgment this is what is

observed.

> "22. Let us first consider the correctness of the observations of the Trial Court that the suit transaction is a money lending transaction. It appears from the reasons assigned by the Trial Court in this context that it has drawn such inference from the facts that on the said date both the parties executed different documents in favour of each other and made payments to each other. At the same time the Trial Court has also observed that the evidence of the plaintiff's father establishes that the item as to the amount of consideration as embodied in the agreement of sale was valid and the consideration amount of the suit transaction was agreed at Rs.2,08,000/- instead of Rs.1,00,000/- According to Trial Judge, it is a material change in the contract having the effect of renovating it.
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> 23. In my considered view, accepting both pleas of the defendants in such a way is not just and proper. It is so because both the pleas are absolutely in consistent with each other. As per first plea that the contract

was renovated, the defendants have agreed that there was an agreement of sale, but the consideration of it, only was modified from Rs.1,00,000/- to Rs.2,08,000/- As per the second plea, it can be said that the defendant wants to say that there was absolutely no transaction of any agreement of sale, but it was just a transaction for advancing and securing the amount of hand loan. In fact, when the defendants want to make out a different intention in the mind of the parties, behind executing the deed in question, he cannot bank upon two altogether different situations, obviously because intention of the parties, depend on the objects in their mind. Where the transaction is entered into merely for money lending, the question of modifying the terms of payment would not arise. Thus, both parties cannot go in hand in hand and only one of them can be accepted to be true. Here, when, in view of the evidence of the plaintiff's father, the defendant has preferred to bank upon the term of modification in the amount of consideration, he cannot be allowed to take a different stand and say that the transaction was a

> money lending transaction and parties were not at all intending to sell or purchase the propeity. Otherwise also, as rightly submitted by the Counsel for the plaintiff, it cannot be a money lending transaction because in this case if the defendants' cotnentions are believed, it will have to be said that on the same day when both these documents were executed, both parties paid amounts to each other and in that case it will be difficult to say as to who is creditor and who is the debtor. In my considered view, therefore, the trial court has committerd error in holding that the suit transaction is a money lending transaction."

15. Thus, the theory and argument of novatio has been rejected by relying upon the oral and documentary evidence. Further in paras 24 to 26 deposition of the parties has been referred to so also the documentary evidence. The learned Appellate Judge has referred to the well settled principles. In such circumstances, the conclusion that neither are there necessary pleadings nor consent of the plaintiff which would enable acceptance of the defendants' case of novatio nor

that the agreement not being intended to be acted upon merely because the plaintiff and his father are living jointly and entire transaction is looked after by his father does not mean that the agreement for sale of immoveable property between the plaintiff and defendant no.2, is vitiated. The lower Appellate Court has rightly held that there is a distinction between the transaction of the father of the plaintiff and defendant no.2 and the subject agreement. Although the agreements are of the same date necessary nexus cannot be established. The lower Appellate Court held that in absence of specific pleas and evidence by merely relying upon the pleadings in the civil suit filed by defendant no.2, the finding cannot be recorded against the original plaintiff/respondent before me. The agreements are distinct transactions and that is how the lower Appellate Court has rightly reversed the judgment and decree of the Trial Court. Its finding on the aspect of readiness and willingness are consistent with the oral and documentary evidence on record. Further, merely because the suit agreement is in respect of the immovable property, which is agricultural land and permission of the Collector is necessary, does not mean that no specific performance of such an agreement can be granted. Reliance has been

rightly placed upon the said principles culled out from the decision of the Supreme Court in this behalf. In my view, accepting Shri Joshi's contention would mean reappreciating and reappraising the material on record which is not permissible in the limited jurisdiction conferred by section 100 of the Code of Civil Procedure.

16. There is no substantial question of law involved. There is no merit in the second appeal which is accordingly dismissed. No costs.

17. In view of dismissal of the second appeal civil application no.62 of 2006 does not survive and hence dismissed as such.

(S.C.DHARMADHIKARI J.)